

**United States Postal Service (Venice, CA) and
American Postal Workers' Union, AFL-CIO,
Venice Local 378. Case 31-CA-11964(P)**

16 May 1985

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

Upon a charge filed by the Union, American Postal Workers' Union, AFL-CIO, Venice Local 378, on 9 March 1982, the General Counsel of the National Labor Relations Board issued a complaint on 23 January 1984 and an amended complaint on 12 September 1984 against the Respondent, United States Postal Service (Venice, CA), alleging that it has violated Section 8(a)(1) of the National Labor Relations Act.

The amended complaint alleges that the Respondent: (1) about 11 December 1981 denied the request of employee Mary Miles to be represented by a union representative during an interview which she reasonably had cause to believe would result in disciplinary action against her; (2) conducted the interview after denying Miles' request for representation; (3) on 21 January 1982 suspended Miles as a result of the 11 December 1981 interview; and (4) on 5 April 1982 discharged Miles as a result of the same interview. The amended complaint further alleges that about 30 November 1982 an impartial arbitrator ordered Miles' reinstatement and that her discharge be changed to a disciplinary suspension without pay.

On 17 September 1984 the Respondent answered the amended complaint admitting in part and denying in part the allegations in the amended complaint.

On 3 October 1984 the Respondent filed a Motion for Summary Judgment. On 10 October 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel filed a response.

Ruling on Motion for Summary Judgment

In its answer to the amended complaint the Respondent admits that it suspended Miles on 21 January 1982 and that it dismissed her on 5 April 1982, but denies that either of these disciplinary actions was the result of the 11 December 1981 interview. The Respondent further asserts that on 29 April 1982 the Board deferred the allegations underlying the amended complaint to the grievance-arbitration procedure established by the collective-bargaining agreement between the Union and itself; that the grievances were duly arbitrated before an

impartial arbitrator; that the unfair labor practice allegations were presented to the arbitrator for resolution; and that the arbitrator found that the Respondent did not violate the National Labor Relations Act, to wit: that the grievant Miles had not been denied her *Weingarten*¹ rights and that there was no evidence of union animus on the part of the Respondent. The Respondent asserts that inasmuch as the arbitration proceedings were fair and regular, all parties had agreed to be bound, and the decision of the arbitrator was not clearly repugnant to the Act the Board should defer to the arbitration award and dismiss the amended complaint in its entirety.

The record indicates that on 3 June 1983 the Acting Regional Director for Region 31 notified the Charging Party Union that he was refusing to issue a complaint on the pending charge. He stated that review of the arbitration proceedings and awards established that all of the alleged unfair labor practice issues were considered and decided by the arbitrator, that the Charging Party Union's objections to the awards do not constitute per se valid grounds for finding that the awards are repugnant to the Act, and that the arbitrator's determination that Miles' *Weingarten* rights had not been violated was based on his discrediting Miles' testimony regarding the circumstances of her removal. Thereafter, on 16 December 1983, the General Counsel through the Office of Appeals sustained the Charging Party Union's appeal of the regional determination not to issue a complaint. The proceeding was then remanded to the Regional Director for Region 31 for issuance of a complaint, absent settlement by the parties.

On 3 October 1984 the Respondent filed a Motion for Summary Judgment with a supporting memorandum and exhibits attached. Among the exhibits submitted are copies of the arbitrator's decisions relating to Miles' suspension and discharge and copies of the parties' posthearing briefs to the arbitrator relating to the discharge. The General Counsel filed a response opposing the Respondent's motion.

Review of the documents before the Board reveals that Miles, working as a postal service window and distribution clerk, serving as the Local Union's president, and a 10-year employee of the Respondent, was given a 5-day disciplinary suspension in January 1982 and was terminated in April 1982. The incidents leading to these two disciplinary actions were the subjects of two separate grievance-arbitration proceedings. Arbitrator Joseph F. Gentile issued an award dated 23 July 1982

¹ *NLRB v J Weingarten*, 420 U.S. 251 (1975)

finding that Miles' suspension was for just cause and that the Respondent was not motivated by anti-union considerations in issuing the suspension and did not violate the Act thereby. On 30 November 1982 Arbitrator Gentile issued a second award finding that Miles' dismissal should be reduced to a suspension without backpay and that the Respondent did not violate the Act by its action. The incident which was the subject of the 30 November 1982 award occurred during the fall of 1981 and was under investigation until April 1982. The subject of the 23 July 1982 suspension arbitration was an incident which occurred in January 1982. The unfair labor practice charge in this proceeding and the allegations in the amended complaint contend that the Respondent violated Miles' *Weingarten* rights during a December 1981 investigatory interview concerning the fall 1981 incident and the Respondent's subsequent disciplinary measures stemmed from the unlawful interview.

In January 1982 Miles received a 5-day suspension for using loud and abusive language to Supervisor Walsh and for failure to follow instructions and extending her break period without permission. Based on credited testimony from four witnesses at the arbitration hearing, in which Miles participated and testified, the arbitrator concluded that Miles did conduct herself in a loud and abusive manner toward her supervisor, causing a disruption of the work area, but that insufficient evidence existed to support the allegations of the unauthorized extension of the breaktime and failure to follow instructions. The arbitrator concluded that the seriousness of the first charge alone warranted imposition of the suspension. He also found that, while some personal animosity may have existed between Miles and Walsh, this strained relationship did not translate into antiunion prejudice. He found no evidence of union animus as a motivating factor in the Respondent's treatment of Miles and that there was no violation of Miles' Section 7 rights under the Act.

In April 1982 Miles was terminated on the grounds that she "obstructed" the delivery of a piece of mail which was addressed to the Venice, California postmaster. The Respondent determined that Miles crossed out the name of the addressee on the piece of mail² and marked it with a return-to-sender stamp. This resulted in the item being returned to the sending party without first having reached the intended recipient. Subsequently, the sending party delivered the item to the addressee, whereupon the Respondent undertook an investigation as to the circumstances of its rerouting. On 11

December 1981 Supervisor Walsh spoke to Miles about the incident.³ Walsh told Miles that the interview was neither disciplinary nor a "discussion." Miles asked for a steward. Walsh replied that none was available; whereupon Miles responded to Walsh's questions. The Respondent continued to investigate the incident through various administrative channels—which included a 2 March 1982 meeting with Miles, accompanied by a union representative, during which Miles admitted that the writing on the rerouted mail was hers—resulting in the 5 April 1982 removal of Miles from the Respondent's employ. Based on his analysis of the evidence the arbitrator concluded that Miles committed a serious infraction of conduct by improperly handling the mail, but that it did not amount to a "knowing, deliberate and wilful obstruction of the mails" as urged by the Postal Service and as cited in its removal letter to Miles. Accordingly, he determined that, while termination was not warranted, an unpaid suspension was an appropriate disciplinary measure for the offense. As requested by the parties, the arbitrator also evaluated the situation from the perspective of whether any unfair labor practice had been committed by the Respondent's conduct. He found no evidence whatsoever of an unlawful motive underlying the Respondent's dismissal of Miles. As to the possibility that Miles' rights under *Weingarten* had been infringed during the 11 December 1981 interview with Walsh, he found that: (1) the interview was an "investigatory interview"; (2) Miles' request for representation was not refused by virtue of Walsh's statement that no steward was then available for such purposes; and (3) Miles was not forced by fear of discipline to respond to Walsh's questions. He found that Miles' continued participation in the interview constituted a waiver of her right to have a union representative present during the interview, particularly in view of her status as president of the Local Union and by virtue of evidence establishing that she was an informed and a vigorous advocate of employee rights. Accordingly, the arbitrator concluded that no violation of Miles' rights under the National Labor Relations Act occurred.

In its motion the Respondent submits that the parties' resolution of these matters through the arbitral process warrants deferral by the Board under its *Spielberg*⁴ doctrine as recently interpreted in *Olin Corp.*⁵ There is no contention that the pro-

² According to the arbitrator's decision, both Walsh and Miles testified about this conversation and there were no substantial differences in their respective accounts. However, where disagreements existed Walsh was credited.

⁴ *Spielberg Mfg Co*, 112 NLRB 1080 (1955)

⁵ 268 NLRB 573 (1984)

² The item was the October issue of the American Postal Workers' Union California Area Local monthly newsletter

ceedings were not fair or regular or that all parties had not agreed to be bound thereby. In addition, the issues presented to the arbitrator were factually parallel to those which are alleged as having constituted unfair labor practices. In fact, the parties stipulated before the arbitrator that the question of whether the Respondent had violated the Act was properly before him. The arbitrator also specifically addressed the unfair labor practice aspects in his decisions, finding in all instances that no violation had occurred.

The General Counsel contends that deferral is not warranted in the circumstances of this case because the arbitrator's resolution of the *Weingarten* issue is at odds with Board decisional precedent. The General Counsel argues that Miles did not effectively waive her right to representation during the 11 December 1981 investigatory interview because after advising her that no steward was available the Respondent did not then advise her that she had the option of either continuing with the interview unrepresented or forgoing the interview. The General Counsel contends that the arbitrator erred by applying a subjective standard, i.e., relying on Miles' position as president of the Local Union and her demonstrated awareness of employee rights, in concluding that Miles was not coerced into participating in the interview without representation. The General Counsel urges that the failure of the Respondent to provide Miles with this choice precludes the finding that Miles voluntarily participated in the interview process and that by

this omission of responsibility the Respondent violated Miles' *Weingarten* rights. The General Counsel contends that absent a contractual provision concerning waiver of these rights the arbitrator's disposition of this issue is repugnant to the Act.

We find that the record before us establishes that the standards for deferral to the arbitration process have been met. The only issue the General Counsel raises concerns the arbitrator's disposition of whether Miles' *Weingarten* rights had been infringed. Whether the arbitrator's analysis of the waiver question comports precisely with certain Board decisional precedent does not affect our conclusion that his assessment is susceptible to an interpretation consistent with the Act. It cannot be described either as "palpably wrong" or "clearly repugnant to the purposes and policies of the Act."⁶ A primary objective of the Board is to foster the collective and cooperative resolution of workplace disputes. We find that the disposition of the unfair labor practice issues raised by the facts of this case warrants deferral; accordingly, the Respondent's Motion for Summary Judgment is granted and the complaint in this case is dismissed.

ORDER

We defer to the arbitration proceedings disposing of the issues in this case and dismiss the complaint.

⁶ See generally *Olin Corp.*, supra, and *Spielberg*, supra. Specifically, employees may, even after having requested that a steward be present, waive the right to representation during a *Weingarten* interview. Here the arbitrator effectively found that Miles knew her lawful choices and by continuing to participate in the interview waived her *Weingarten* rights.